

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SANDRA CISKE and DANIEL
CISKE, and their marital
community,

Plaintiffs,

v.

HOUSE OF BLUES CONCERTS,
INC.; STARPLEX
CORPORATION; CROWD
MANAGEMENT SYSTEMS, a
wholly owned subsidiary of
Starplex, Inc.,

Defendants.

DANIEL CISKE and SANDRA
CISKE, and their marital
community,

Plaintiffs,

v.

KEN MacDONALD; KCLICKITAT
COUNTY; MARYHILL WINERY;
MARYHILL WINERY
AMPHITHEATER, LLC;
STARPLEX CORPORATION;
CROWD MANAGEMENT
SYSTEMS; a wholly owned
subsidiary of Starplex, Inc.,

Defendants.

NO. CV-06-3085-RHW
(Consolidated)

**ORDER DENYING IN PART,
GRANTING IN PART MOTION
TO STRIKE *INTER ALIA***

Before the Court are Defendant Klickitat County's Motion for Summary
Judgment (Ct. Rec. 68) and Motion for Joinder in Defendant Ken MacDonald's

**ORDER DENYING IN PART, RESERVING IN PART MOTION TO
STRIKE *INTER ALIA* * 1**

1 Motion to Strike (Ct. Rec. 161). Also before the Court are Defendant Ken
 2 MacDonald's Motion for Summary Judgment (Ct. Rec. 74), Motion to Strike (Ct.
 3 Rec. 152), Motion to Expedite Regarding Motion to Strike (Ct. Rec. 178), Motion
 4 to Expedite Regarding Overlength Brief (Ct. Rec. 180), and Motion for Leave to
 5 File Excess Pages (Ct. Rec. 182). Currently pending are also several motions
 6 offered by and against Defendants House of Blues, Maryhill Winery, and Maryhill
 7 Amphitheatre (Ct. Recs. 48, 84, 112, 144, 146, 165, 171, & 174). Those parties
 8 settled their claims with Plaintiffs, so those motions are denied as moot. A
 9 hearing was held on April 15, 2008. Plaintiff Daniel Ciske was present and
 10 represented by Timothy Ford and Katherine Chamberlain. Jerry Moberg appeared
 11 on behalf of Defendant Klickitat County, and Michael McFarland appeared on
 12 behalf of Defendant Ken MacDonald.

13 **I. Motion to Strike**

14 Because the Court's holding on MacDonald's Motion to Strike (Ct. Rec.
 15 152) could affect its reasoning on the remaining motions, the Court addresses this
 16 motion first. Defendant MacDonald, joined by Klickitat County, moves the Court
 17 to strike certain evidence offered in support of Plaintiffs' statement of facts.
 18 Under Federal Rule of Civil Procedure 56(e), an affidavit supporting or opposing
 19 summary judgment must "set out facts that would be admissible in evidence[.]"
 20 Fed. R. Civ. P. 56(e)(1). MacDonald submits that a number of documents attached
 21 to Plaintiffs' counsel's declaration should be stricken because they were not
 22 properly authenticated, they are inadmissible character evidence, they are hearsay,
 23 and/or they are not relevant or speculative.¹ Plaintiffs objected to this motion's
 24

25 ¹ In particular, MacDonald asks the Court to strike Exhibits 32, 33, 40, 41,
 26 42, 43, 44, 45, 48, 58, and 61-65 to the Declaration of Timothy Ford because they
 27 have not been properly authenticated; Exhibits 40, 41, 42, 43, 44, 47, 48, 49, 56,
 28 58, 59, 61-65, and portions of 29 and 54 because they contain inadmissible

1 length and to MacDonald's request to hear it on an expedited basis. The Court
2 opts to consider the motion as filed and in conjunction with the summary judgment
3 motions.

4 **A. Authenticity**

5 The Ninth Circuit has "repeatedly held that unauthenticated documents
6 cannot be considered in a motion for summary judgment." *Orr v. Bank of Am., NT*
7 *& SA*, 285 F.3d 764, 773 (9th Cir. 2002). "Authentication is a special aspect of
8 relevancy concerned with establishing the genuineness of evidence." *Id.* at 773
9 n.7. In a summary judgment motion, documents may be authenticated through
10 personal knowledge or through any manner permitted by Federal Rule of Evidence
11 901(b) or 902. *Id.* at 774 (citing Fed. R. Evid. 901(b) (providing ten approaches to
12 authentication); Fed. R. Evid. 902 (self-authenticating documents need no
13 extrinsic foundation)). The documents "must be 'attached to an affidavit that
14 meets the requirements of [Fed. R. Civ. P.] 56(e) and the affiant must be a person
15 through whom the exhibits could be admitted into evidence.'"² *Id.* (citation
16 omitted).

17 Documents produced in discovery by an opposing party are deemed
18 authentic when offered by the party-opponent. *Id.* at 777, 777 n.20. Additionally,
19 "when a document has been authenticated by a party, the requirement of
20

21 character evidence; Exhibits 32, 33, 40, 41, 42, 43, 44, and 61-65 because they are
22 inadmissible hearsay; and Exhibit 33 because it is not relevant, it is inadmissible
23 opinion testimony, and it is speculative.

24 ² The Court notes that the personal knowledge requirement only applies to
25 documents sought to be admitted by being attached to an affidavit. *Orr*, 285 F.3d
26 at 778 n.24. Documents attached to an exhibit list, for instance, "could be
27 authenticated by review of their contents if they appear to be sufficiently genuine."
28 *Id.* (citations omitted).

1 authenticity is satisfied as to that document with regards to all parties, subject to
2 the right of any party to present evidence to the ultimate fact-finder disputing its
3 authenticity.” *Id.* at 776.

4 Plaintiffs responded to this motion by filing an affidavit which establishes
5 that the documents whose authenticity was challenged were offered by either
6 Klickitat County or MacDonald in discovery. It does not appear from the briefing
7 that MacDonald or Klickitat County challenges the genuineness of these
8 documents. Accordingly, the Court denies the motion to strike Exhibits 32, 33,
9 40, 41, 42, 43, 44, 45, 48, 58, and 61-65 to the Declaration of Timothy Ford on the
10 basis of authentication.

11 **B. Character Evidence**

12 MacDonald next asks the Court to strike certain evidence because it is
13 inadmissible character evidence pursuant to Federal Rule of Evidence 404(b).
14 Rule 404(b) states that “evidence of other crimes, wrongs, or acts is not admissible
15 to prove the character of a person in order to show action in conformity therewith.
16 It may however be admissible for other purposes, such as motive, opportunity,
17 intent, preparation, plan, knowledge, identity,” Fed. R. Evid. 404(b).
18 MacDonald submits that this rule mandates exclusion of prior employee
19 reprimands and alleged misconduct. He argues that evidence regarding the
20 character of a witness is only admissible pursuant to Rules 607, 608, and 609.

21 Rule 608 permits opinion and reputation evidence of character for
22 truthfulness or untruthfulness, but does not allow the introduction of extrinsic
23 evidence to prove specific instances of conduct that illustrate the witness’s
24 character. Fed. R. Evid. 608. Rule 609 precludes the introduction of prior
25 convictions that are more than ten years old except under certain circumstances.
26
27
28

1 Fed. R. Evid. 609. MacDonald also cites to Rule 403³ in support of exclusion of
2 the exhibits listed. The evidence MacDonald seeks to exclude on this basis
3 includes his prior employee reprimands, his prior convictions for DUI and minor
4 in possession in the 1980's, and other evidence of alleged misconduct.

5 As the Court stated at the hearing, it appears Plaintiffs offer the evidence
6 regarding MacDonald's history of reprimands by his then-employer, Klickitat
7 County Sheriff's Office, not to prove his character or to show action in conformity
8 therewith, but instead to prove motive (as to MacDonald) and knowledge (as to
9 Klickitat County). The Court finds that the evidence regarding MacDonald's
10 convictions from the 1980's, his terminations from jobs before being hired by
11 Klickitat County, and any reprimands for alleged misconduct after the incident
12 involving Plaintiffs are not admissible for those purposes. Therefore, page 15 of
13 Exhibit 29, Exhibit 44, page 7 of Exhibit 49, and Exhibit 58 to the Declaration of
14 Timothy Ford are stricken.

15 However, the Court notes that the record is not well developed regarding the
16 remaining allegations of misconduct and reprimands. As it mentioned at the
17 hearing, the Court cannot ascertain from the record as it now stands whether the
18 evidence apart from the Sheriff's Office's official letters of reprimand (Exhibits
19 40, 42, & 43) would be admissible under Rule 403. Therefore, the Court reserves
20 ruling on the motion to strike the remaining exhibits and portions thereof on this
21 basis.

22 C. Hearsay

23
24 ³ Rule 403 states "[a]lthough relevant, evidence may be excluded if its
25 probative value is substantially outweighed by the danger of unfair prejudice,
26 confusion of the issues, or misleading the jury, or by considerations of undue
27 delay, waste of time, or needless presentation of cumulative evidence." Fed. R.
28 Evid. 403.

1 MacDonald seeks to strike another group of exhibits because he asserts they
2 are inadmissible as hearsay. This evidence relates to the arrest and acquittal of
3 Plaintiff Daniel Ciske and to MacDonald's employment history with the Klickitat
4 County Sheriff's Office. MacDonald asserts that this evidence is offered to prove
5 the truth of the matter asserted and thus constitutes inadmissible hearsay.
6 MacDonald submits that Exhibit 33, which is the transcript of Judge Brian
7 Altman's ruling for acquittal in Mr. Ciske's criminal trial, is inadmissible hearsay,
8 as are Mr. Ciske's booking summary sheet and the records in MacDonald's
9 administrative file.

10 Hearsay is "a statement other than one made by the decalarant while
11 testifying at the trial or hearing, offered in evidence to prove the truth of the matter
12 asserted." Fed. R. Evid. 801(c). The Court's conclusion that the records from
13 MacDonald's personnel file are being offered to show motive and knowledge
14 likewise illustrates that those records are not hearsay, for they are not being
15 offered to show the truth of the matter asserted. *See* Fed. R. Evid. 801. This
16 leaves Exhibit 33, the transcript of Judge Altman's ruling for acquittal in Mr.
17 Ciske's criminal trial.

18 The Ninth Circuit has found that a prior judgment is "hearsay to the extent
19 that it is offered to prove the truth of the matters asserted in the judgment." *United*
20 *States v. Boulware*, 384 F.3d 794, 805-06 (9th Cir. 2004), *cert. denied* 546 U.S.
21 814 (2005).

22 It is even more plain that the introduction of discrete judicial
23 factfindings and analysis underlying the judgment to prove the truth
24 of those findings and that analysis constitutes the use of hearsay. The
25 concern about evidence that is neither based on personal knowledge
26 nor subject to cross-examination, which explains an ultimate
27 judgment's treatment as hearsay, . . . is even more pronounced when
dealing with statements that recapitulate in detail others' testimony
and declarations. We therefore agree with the Fourth, Tenth, and
Eleventh Circuits that judicial findings of facts are hearsay,
inadmissible to prove the truth of the findings unless a specific
hearsay exception exists.

28 *United States v. Sine*, 493 F.3d 1021, 1036 (9th Cir. 2007) (internal citation

omitted). Plaintiffs have not submitted any specific hearsay exception which would render Exhibit 33 admissible. Therefore, the Court grants MacDonald's motion to strike Exhibit 33 to the Declaration of Timothy Ford on this basis.

II. Motions for Summary Judgment

A. Standard of Review

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "When the moving party has carried its burden of [showing that it is entitled to judgment as a matter of law], its opponent must do more than show that there is some metaphysical doubt as to material facts. In the language of [Rule 56], the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (quoting Fed.R.Civ.Pro. 56(e)) (emphasis in original) (internal citations omitted). If the nonmoving party fails to make such a showing for any of the elements essential to its case for which it bears the burden of proof, the trial court should grant the summary judgment motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When considering a motion for summary judgment, a court should not weigh the evidence or assess credibility; instead, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

B. Facts

The facts below are undisputed unless otherwise indicated. All of the claims against the Defendants in this matter arise out of the same series of events.

On September 17, 2004, Plaintiffs Daniel and Sandra Ciske and a friend, Emily Leslie, attended the Willie Nelson concert at the Maryhill Winery. Mr. Ciske was a 59-year-old insurance agent with no criminal record at that time.

ORDER DENYING IN PART, RESERVING IN PART MOTION TO STRIKE *INTER ALIA* * 7

1 Defendant Deputy Ken MacDonald was a Klickitat County Sheriff's Deputy
2 working security at the concert. Klickitat County asserts MacDonald was off-duty
3 that evening and working for Maryhill, Starplex, and/or Crowd Management
4 Systems. Plaintiffs argue that he was in uniform performing law enforcement
5 duties, and that he was working for the Maryhill Winery with the knowledge and
6 permission of Klickitat County at the time he arrested Mr. Ciske and prosecuted
7 Mrs. Ciske.

8 Patrons of the concert were required to park some distance away from the
9 Winery, and buses were provided to take them back to their cars after the concert
10 ended. There were only eight buses available to serve about 4,000 concert-goers.
11 Consequently, many concert attendees had to wait for a considerable amount of
12 time in the rain. At the end of the show, Plaintiffs decided to walk to their car
13 rather than wait for the bus.

14 As they were walking, Mrs. Ciske was stopped by a security guard and told
15 she could not walk any further. She responded that there was no law against
16 walking, and, when she saw her husband still walking in front of her, she
17 continued walking. According to Mrs. Ciske, at that point Dan Lasswell (a Crowd
18 Management Systems (CMS) employee) appeared in front of her, put his hands on
19 her chest, and stopped her. She responded by asking him "what the hell" he was
20 doing. Mr. Ciske heard the commotion, turned around, and saw Lasswell with his
21 hands on Mrs. Ciske's chest, and possibly breasts, so he yelled at him to "get your
22 fucking hands off my wife or I will kick your ass."⁴

23 Deputy MacDonald then stepped in, and he yelled something to Mr. Ciske
24

25 ⁴ Many facts relate to the interaction between MacDonald and Mr. Ciske.
26 However, Mr. Ciske settled his claims with both Klickitat County and MacDonald.
27 The only remaining claims are those between Mrs. Ciske and Defendants Klickitat
28 County and MacDonald.

1 about repeating what Mr. Ciske had said to Lasswell. Mr. Ciske did repeat his
2 threat, and MacDonald then told Mr. Ciske he was under arrest. Plaintiffs assert
3 that MacDonald provoked this verbal exchange. Plaintiffs also assert he arrested
4 Mr. Ciske without probable cause.

5 MacDonald attempted to restrain Mr. Ciske by placing an arm behind his
6 back, but Ciske spun away from him and a scuffle ensued. Plaintiffs characterize
7 the "scuffle" as an assault. During the scuffle, assault, or arrest, Plaintiffs state
8 that MacDonald knocked Mr. Ciske to the ground, purposely hit his head against a
9 rough stone surface, and pulled his arms behind his back, injuring his knees, face,
10 and shoulders. Mr. Ciske was also sprayed with pepper spray by an assisting
11 deputy, Deputy Kaley. Plaintiffs assert that when MacDonald arrested Mr. Ciske,
12 he claimed to be exercising his police powers as a Klickitat County deputy.

13 Klickitat County asserts that MacDonald contended during the scuffle that
14 Mrs. Ciske was grabbing at his jacket in an attempt to pull him away from Mr.
15 Ciske, so he cited her for obstruction of justice. Plaintiffs dispute that MacDonald
16 contended Mrs. Ciske grabbed his jacket at that time, and they submit he did not
17 cite Mrs. Ciske for obstruction of justice until later. Plaintiffs state that, at the
18 scene of the incident, MacDonald did not cite or charge Mrs. Ciske, or even ask
19 for her identification. MacDonald states that Mrs. Ciske became very upset and
20 began yelling aggressive language at the time of the arrest. Plaintiffs assert that
21 Mrs. Ciske had no physical contact with MacDonald during the arrest. Lasswell
22 eventually pushed Mrs. Ciske to the ground and handcuffed her, injuring her in the
23 process.

24 Plaintiffs assert MacDonald only charged Mrs. Ciske with obstruction after
25 she went to the Klickitat County Sheriff's Office and complained about his
26 misconduct. She and her friend, Ms. Leslie, went to the Sheriff's Office
27 immediately from Maryhill Winery to see about Mr. Ciske, and two deputies took
28 pictures of the injuries to her hand and the injuries and bruises on her hips and

1 legs. During this process, MacDonald took Mrs. Ciske's identification, later
2 returning with a citation charging her with obstruction of justice. The citation
3 issued by MacDonald stated that Mrs. Ciske "attacked me grabbing at my jacket
4 and trying to pull me off her husband." MacDonald and two other witnesses
5 testified at trial that Mrs. Ciske jumped on his back when he was trying to gain
6 control over Mr. Ciske. However, Mrs. Ciske and two other witnesses testified
7 that she did not. The citation of Mrs. Ciske initiated a criminal prosecution for a
8 gross misdemeanor.

9 Mrs. Ciske did not file a written complaint at the Sheriff's Office that night
10 because she decided to speak to her attorney first. Nothing was done to
11 investigate her complaints. Plaintiffs submit that Klickitat County's Rules of
12 Conduct require its employees to promptly record a citizen complaint in writing
13 and submit it to his or her supervisor, but Klickitat County disputes this
14 characterization of the policy. Klickitat County states that, even though a
15 Sergeant spoke to Mrs. Ciske about filing a complaint, she refused to do so, and
16 she did not tell him she wanted to pursue one against MacDonald.

17 After Mr. Ciske was in custody, Plaintiffs note that it was apparent both he
18 and Mrs. Ciske had been injured. Plaintiffs assert they were both injured as a
19 result of MacDonald's actions. Klickitat County disputes this and notes that Mrs.
20 Ciske testified that her injuries were caused when she was pushed to the ground by
21 CMS employee Lasswell. MacDonald had Mr. Ciske booked on a felony assault
22 charge. Mr. Ciske remained in jail for the weekend as a result of the felony
23 charge. The Klickitat County Prosecuting Attorney filed misdemeanor charges
24 against Mr. Ciske in lieu of felony charges, however.

25 Plaintiffs state that, because of his misconduct record, MacDonald stood to
26 lose his job because of his "mistreatment" of Mr. Ciske. Plaintiffs cite to several
27 incidents in MacDonald's record in their statement of facts, including three
28 separate letters of reprimand. They state that, as a result of an earlier incident in

1 which he used excessive force, MacDonald was suspended for three days on
2 October 22, 2003, and that he was told that another such incident could result in
3 his termination. Plaintiffs maintain that MacDonald therefore knew that Mrs.
4 Ciske's complaint about his misconduct could cost him his job, but Defendants
5 assert this is inadmissible speculation.

6 Mrs. Ciske challenged her citation in court and went to trial, where she
7 asserted the defense of self or others as a defense. She was acquitted on the
8 obstruction charge, and the jury determined that any use of force was lawful and
9 she was protecting her family. Plaintiffs include in their statement of facts both of
10 their testimony of what they recalled transpired that night, along with the
11 testimony of their friend, Ms. Leslie, who was accompanying them, and the
12 closing arguments of their attorney. All parties also submit the jury instructions.

13 At the time of the incident, Plaintiffs note that the Sheriff of Klickitat
14 County was Chris Mace, a friend of MacDonald. Plaintiffs state he was a "close,
15 personal friend," but Klickitat County disputes this characterization and submits
16 they had a relationship similar to Sheriff Mace's relationship with other deputies.
17 Plaintiffs submit several incidents of misconduct or alleged misconduct from
18 MacDonald's employment of which Sheriff Mace was aware. Klickitat County
19 clarifies and objects to the inclusion of these incidents in the record, as does
20 MacDonald. Plaintiffs also submit comments about misconduct by and Sheriff
21 Mace's favoritism of MacDonald. MacDonald left the Klickitat County Sheriff's
22 Office in September 2007.

23 C. Analysis

24 1. Claims Under § 1983

25 Plaintiff Sandra Ciske asserts the same claims against both Defendants
26 Klickitat County and Ken MacDonald: § 1983, malicious prosecution, and
27 derivative and consortium claims. MacDonald's and Klickitat County's motions
28 address only the § 1983 and state law malicious prosecution claims.

1 Section 1983 creates a cause of action against any person who, acting under
 2 color of state law, violates the constitutional rights of another person. 42 U.S.C. §
 3 1983; *Mabe v. San Bernardino County, Dep't of Public Soc. Serv.*, 237 F.3d 1101,
 4 1106 (9th Cir. 2001). To succeed on a § 1983 claim, Plaintiff must show that (1)
 5 the conduct complained of was committed by a person acting under color of state
 6 law; and (2) the conduct deprived her of a constitutional right. *Long v. County of*
 7 *Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006).

8 **a. Fourth Amendment Claim**

9 Mrs. Ciske first alleges that Defendants violated her Fourth Amendment
 10 right to be free from an unreasonable seizure of her person. A Fourth Amendment
 11 seizure occurs when a person is held in custody by arresting officers. *Karam v.*
 12 *City of Burbank*, 352 F.3d 1188, 1193 (9th Cir. 2003). Defendant MacDonald
 13 argues that Mrs. Ciske was never taken into custody, and that the issuance of a
 14 criminal citation does not amount to a constitutional "seizure." Case law supports
 15 this conclusion. *See Britton v. Maloney*, 196 F.3d 24, 29-30 (1st Cir. 1999)
 16 (holding that "[a]bsent any evidence [plaintiff] was arrested, detained, restricted in
 17 his travel, or otherwise subject to a deprivation of his liberty before the charges
 18 against him were dismissed, the fact that he was given a date to appear in court is
 19 insufficient to establish a seizure within the meaning of the Fourth Amendment.")
 20 (cited with approval in *Karam*, 352 F.3d at 1193); *see also Martinez v. Carr*, 479
 21 F.3d 1292, 1299 (10th Cir. 2007) (finding that "the issuance of a citation, even
 22 under threat of jail if not accepted, does not rise to the level of a Fourth
 23 Amendment seizure"). Although the Ninth Circuit has not reached the exact issue
 24 present here, it came close in *Karam*, in which it found that pretrial release
 25 conditions that required the plaintiff to "show up for court appearances and obtain
 26 permission from the court if she wanted to leave the state" were "*de minimus*" and
 27 did not constitute a Fourth Amendment seizure. 352 F.3d at 1194.

28 Plaintiffs argue that the above-cited holdings do not preclude her

1 constitutional claim under the Fourth Amendment. They direct the Court to
2 Justice Ginsburg's concurring opinion in *Albright v. Oliver*, 510 U.S. 266, 278-79
3 (1994) (Ginsburg, J. concurring); in which she explains that common law regarded
4 "the difference between pretrial incarceration and other ways to secure a
5 defendant's court attendance as a distinction between methods of retaining control
6 over a defendant's person, not one between seizure and its opposite." However,
7 this not controlling precedent, and there has since been published a Ninth Circuit
8 case that contradicts Plaintiffs' desired interpretation. *Karam, supra*.

9 The parties do not dispute that MacDonald issued Mrs. Ciske a citation
10 only, nor do they dispute that she was never taken into custody. Therefore, there
11 is no genuine issue of material fact regarding Mrs. Ciske's Fourth Amendment
12 claim. Accordingly, regardless of MacDonald's motivation for citing Mrs. Ciske,
13 no constitutional seizure occurred and there is no cognizable claim under § 1983
14 for a Fourth Amendment violation against Defendant MacDonald or Defendant
15 Klickitat County. The Court grants Defendants summary judgment on this claim.

16 **b. Fourteenth Amendment Claim**

17 Next, Mrs. Ciske alleges that Defendants "caused her to be prosecuted" by
18 issuing her a criminal citation without probable cause and based upon "knowingly
19 false statements." This is in essence a constitutionally-based malicious
20 prosecution claim.

21 "To prevail on a § 1983 claim of malicious prosecution, a plaintiff 'must
22 show that the defendants prosecuted [him] with malice and without probable
23 cause, and that they did so for the purpose of denying [him] equal protection or
24 another specific constitutional right.'" *Awabdy v. City of Adelanto*, 368 F.3d
25 1062, 1066 (9th Cir. 2004) (quoting *Freeman v. City of Santa Ana*, 68 F.3d 1180,
26 1189 (9th Cir. 1995)). As is the case here, malicious prosecution claims may be
27 brought against persons other than prosecutors who have wrongfully caused
28 charges to be filed. *Id.*

1 The "malice" element of a malicious prosecution claim "relates to the
2 subjective intent or purpose with which the defendant acted in initiating the prior
3 action[.]" and it is "usually a question of fact for the jury to determine." *Estate of*
4 *Tucker v. Interscope Records, Inc.*, 515 F.3d 1019, 1030 (9th Cir. 2008) (citations
5 omitted). However, summary judgment based on lack of malice may still be
6 appropriate "when there is no evidence from which a reasonable fact finder could
7 conclude that the defendant pursued the underlying action with malice." *Id.*

8 Probable cause, in contrast, is a question of law which requires an objective
9 inquiry: "whether a reasonable person would have thought that the [underlying]
10 claim was legally tenable 'without regard to [the defendant's] mental state.'" *Id.*
11 at 1031 (citation omitted). "[W]hen the state of the defendant's factual
12 knowledge is resolved or undisputed, it is the court which decides whether such
13 facts constitute probable cause or not." *Id.* (citation omitted).

14 Defendant MacDonald argues that Mrs. Ciske has no constitutional right "to
15 be free from criminal prosecution except upon probable cause." *Albright*, 510
16 U.S. at 268. However, a malicious prosecution claim is still cognizable under §
17 1983 so long as the plaintiff proves the defendants "acted for the purpose of
18 depriving him of a 'specific constitutional right[.]'" *Awabdy*, 368 F.3d at 1069.
19 Plaintiffs assert MacDonald acted for the purpose of depriving her of her First
20 Amendment right to file a complaint against him. Plaintiffs submit that Mrs.
21 Ciske's First Amendment rights were implicated when MacDonald gave her the
22 citation, and they point out that there is "abundant circumstantial evidence" that
23 this was the reason MacDonald charged her.

24 Defendant MacDonald also argues that Mrs. Ciske's malicious prosecution
25 claim is based on her assertion that he provided false information and false
26 testimony at her trial about her jumping on his back. He submits that her claim is
27 therefore precluded because of the jury's finding in her case that she used
28 "reasonable force" to defend her husband. He maintains she is collaterally

1 estopped from arguing now that she did not jump on his back. Defendant
2 MacDonald is essentially attempting to erase this issue of fact from this Court's
3 record by virtue of that jury's holding.

4 Plaintiffs maintain that MacDonald cannot establish the first necessary
5 element for collateral estoppel to apply: identity of issues. *See State v. Williams*,
6 132 Wn.2d 248, 254 (1997) (listing the elements for collateral estoppel under
7 Washington law as "(1) the issue decided in the prior adjudication must be
8 identical with the one presented in the second; (2) the prior adjudication must have
9 ended in a final judgment on the merits; (3) the party against whom the plea of
10 collateral estoppel is asserted must have been a party or in privity with a party to
11 the prior litigation; and (4) application of the doctrine must not work an
12 injustice"). Plaintiffs assert that MacDonald cannot use Mrs. Ciske's acquittal to
13 curtail her rights in a later civil case based on the jury's finding and inferences
14 from it. Mrs. Ciske stands by her assertion that she did not jump on MacDonald's
15 back, and she submits that the jury's finding that she acted in self-defense does not
16 collaterally estop her from making this assertion.

17 The Court finds that MacDonald has not established all the elements of
18 collateral estoppel so as to preclude the Court's consideration of the parties'
19 factual dispute regarding the events leading to the issuance of Mrs. Ciske's
20 citation for obstruction.⁵ Consequently, taking Plaintiffs' version of the facts as
21 true, as the Court must in summary judgment, the Court may assume Mrs. Ciske
22 did not jump on MacDonald's back at the time of Mr. Ciske's arrest. The Court
23 finds that there are genuine issues of material fact regarding probable cause.

24 Plaintiffs further assert that there is sufficient evidence on the record to raise
25

26 ⁵ Under RCW § 9A.76.020, "[a] person is guilty of obstructing a law
27 enforcement officer if the person willfully hinders, delays, or obstructs any law
28 enforcement officer in the discharge of his or her official powers or duties."

1 an inference of malice and of a motivation to deprive her of her constitutional
2 right to file a complaint. MacDonald counters that Plaintiffs' conclusion that he
3 cited her to silence her criticism of him is pure speculation, and that the facts show
4 that he issued the citation before she made any complaint and before he had any
5 knowledge that she would make a complaint. Defendant argues that a party
6 cannot defeat a motion for summary judgment with evidence that amounts to
7 speculation and conjecture. *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464,
8 1466-67 (9th Cir. 1986).

9 From the pleadings, it is obvious that the parties disagree as to the facts
10 underlying Mrs. Ciske's citation and MacDonald's motivation for issuing the
11 citation. Whether MacDonald acted with "malice" is generally a question for the
12 jury, and the Court finds that the evidence showing the timing of the events on the
13 night in question⁶ in conjunction with the evidence of MacDonald's past letters of
14 reprimand is sufficient to create an inference that MacDonald was motivated to
15 issue the citation in order to deprive Mrs. Ciske of her constitutional right to file a
16 complaint. Accordingly, the Court finds that genuine issues of material fact exist
17 and summary judgment is not appropriate for Mrs. Ciske's § 1983 malicious
18 prosecution claim.

19 c. Municipal Liability

20 "[A] municipality cannot be held liable *solely* because it employs a
21 tortfeasor—or in other words, a municipality cannot be held liable under § 1983
22 on a *respondeat superior* theory." *Monell v. Dep't of Social Servs. of City of New*
23 *York*, 436 U.S. 658, 691 (1978) (emphasis in original). "[I]t is when execution of a
24

25 ⁶ Mrs. Ciske was present when MacDonald was arresting Mr. Ciske at
26 Maryhill Winery. He did not issue a citation there or ask for her identification.
27 MacDonald instead issued citation after Mrs. Ciske went to the Sheriff's Office to
28 see about her husband and complain about MacDonald's treatment of him.

1 government's policy or custom . . . inflicts the injury that the government as an
2 entity is responsible under § 1983." *Id.* at 694. "A policy is a deliberate choice to
3 follow a course of action . . . made from among various alternatives by the official
4 or officials responsible for establishing final policy with respect to the subject
5 matter in question." *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir.
6 2006) (internal quotation marks and citation omitted).

7 Plaintiffs correctly point out that at the time MacDonald issued the citation
8 and initiated the prosecution of Mrs. Ciske, he was acting under color of state law
9 and in his capacity as an employee of Klickitat County. Plaintiffs' assert Klickitat
10 County had a policy of inaction regarding MacDonald's misconduct, and that
11 Sheriff Mace essentially ratified MacDonald's conduct. Plaintiffs discuss at great
12 length in their response memorandum MacDonald's relationship, personal and
13 professional, with Sheriff Mace, and they allege that under Sheriff Mace the
14 County's disciplinary process was flawed and that Sheriff Mace's deliberate
15 indifference of MacDonald's repeated and regular misconduct was the "moving
16 force" behind MacDonald's violation of Mrs. Ciske's constitutional rights. The
17 Court cannot determine whether Plaintiffs are raising a ratification argument for
18 municipal liability or a failure to act theory, but it finds that neither supports a
19 finding of municipal liability.

20 The ratification doctrine originated as a basis for municipal liability in *St.*
21 *Louis v. Praprotnik*, 485 U.S. 112 (1988). *Haugen v. Brosseau*, 351 F.3d 372, 393
22 (9th Cir. 2003). A plurality of the Supreme Court in *Praprotnik* stated that "[i]f
23 the authorized policymakers approve a subordinate's decision and the basis for it,
24 their ratification would be chargeable to the municipality because their decision is
25 final." *Praprotnik*, 485 U.S. at 127. Therefore, "[a] single decision by a
26 municipal policymaker 'may be sufficient to trigger section 1983 liability under
27 *Monell*, even though the decision is not intended to govern future situations, . . .
28 but the plaintiff must show that the triggering decision was the product of a

1 'conscious, affirmative choice' to ratify the conduct in question." *Haugen*, 351
2 F.3d at 393 (internal citation omitted).

3 Plaintiffs point to one incident not mentioned above in which they claim
4 MacDonald falsely charged an individual, Nathan Lane, after he attempted to file a
5 complaint with the Sheriff's Office. Klickitat County and MacDonald dispute
6 Plaintiffs' version of the events surrounding the Lane incident. Looking at the two
7 exhibits related to the Lane incident, Exhibits 41 and 59, it is clear that Mr. Lane
8 did not file a written complaint and that he was not issued a citation nor was he
9 aware of any potential for a citation. Exhibit 41 is the police report generated after
10 Mr. Lane called the Klickitat County Sheriff's Office. The report, which is date
11 and time stamped to show it was written on August 24, 2003, at 23:24:08, states
12 that Mr. Lane called dispatch at 20:27, approximately three hours before the report
13 was written, to report that Deputy MacDonald assaulted him at the Maryhill
14 Winery. The reporting officer attempted to contact Mr. Lane, but the number he
15 had was not in service. The reporting officer also contacted MacDonald, who said
16 he had already drawn a case number on the matter and believed that Mr. Lane
17 should have been arrested. Nothing else came of the incident. Mr. Lane did not
18 file a complaint or ever contact the Sheriff's Office again, and MacDonald did not
19 issue a citation. Sheriff Mace testified that he was not aware of the incident. (Ct.
20 Rec. 137, at 261; Mace Dep., at 86).

21 Taking Plaintiffs' version of the facts surrounding the Lane incident as true,
22 and assuming MacDonald did assault Mr. Lane as Mr. Lane claims in his affidavit,
23 the Court cannot infer from these facts that the County's and/or Sheriff Mace's
24 failure to discipline MacDonald in this one specific instance is an adequate basis
25 for municipal liability under *Monell*. See *Haugen*, 351 F.3d at 393 (finding that
26 "[a]lthough some municipal pronouncements ratifying a subordinate's action
27 could be tantamount to the announcement or confirmation of a policy for purposes
28 of *Monell*, here there are no facts in the record that suggest that the single failure

1 to discipline [the defendant] rises to the level of such a ratification.”).

2 Considering the short amount of time between Mr. Lane’s call and the writing of
3 the report, along with the lack of follow up on any party’s behalf, Plaintiffs have
4 not shown any “triggering decision” that ratified MacDonald’s conduct, let alone
5 that the decision was made consciously and affirmatively to ratify his conduct.

6 Although there may be a genuine issue of fact regarding what happened between
7 MacDonald and Mr. Lane on August 24, 2003, it is not material to Klickitat
8 County’s liability for MacDonald’s actions involving Mrs. Ciske.

9 To impose liability against a municipality for its failure to act, a plaintiff
10 must show: “(1) that a county employee violated the plaintiff’s constitutional
11 rights; (2) that the county has customs or policies that amount to deliberate
12 indifference; and (3) that these customs or policies were the moving force behind
13 the employee’s violation of constitutional rights.” *Long*, 442 F.3d at 1186. The
14 Ninth Circuit has noted that “a municipal defendant’s failure to fire or reprimand
15 officers” may evidence a policy of deliberate indifference to their misconduct.
16 *Henry v. County of Shasta*, 132 F.3d 512, 520 (9th Cir. 1997).

17 Klickitat County lists the various disciplinary sanctions issued to
18 MacDonald during his tenure at the Sheriff’s Department under Sheriff Mace.

- 19 • He received a letter of reprimand on July 2, 2001, for disobeying a
20 superior’s orders.
- 21 • On August 6, 2001, he received another letter of reprimand for
22 disobeying a directive from Sheriff Mace about releasing information.
- 23 • On March 21, 2002, he received a verbal warning for making a
24 statement to a citizen that she believed was inappropriate.
- 25 • On October 3, 2003, he received a written reprimand for using
26 inappropriate language with a suspect.
- 27 • On October 23, 2003, he received a three-day unpaid suspension for
28 inappropriately using his firearm as an impact weapon during an

1 incident.

2 Klickitat County submits that there is no evidence that MacDonald was not
3 properly supervised, trained, or disciplined.

4 Plaintiffs submit in their Statement of Facts that “[w]hen citizen complaints
5 were made, and even when they were sustained, they were not tracked or counted
6 on the deputy’s record unless the undersheriff happened to bring them up at the
7 time of the deputy’s annual evaluation.” (Ct. Rec. 138, at 30, ¶149). In support,
8 they cite to two pages of Exhibit 45 that do not exist. Plaintiffs’ assertion
9 concerned the Court, for if there were evidence that this was so, then municipal
10 liability would be a close question. Consequently, the Court searched Plaintiffs’
11 exhibits for any evidence that would support such a conclusion⁷ and found no
12

13 ⁷ The Court examined Exhibit 46, which contains excerpts of the deposition
14 of Undersheriff Erik Anderson. During that deposition, the witness examined
15 MacDonald’s performance evaluations from two years in which citizens
16 complained about his behavior on two occasions. The performance evaluations
17 did not reference the complaints at all. The witness, who did not prepare the
18 performance evaluations, speculated that “we weren’t always in the field as
19 sergeants kept apprised of complaints We weren’t always being informed as
20 to what our people were being counseled for or disciplined. . . . But if
21 [MacDonald] had a complaint during this evaluation period, especially one that
22 was founded, you would think it would be here. I don’t know why it is not.” (Ct.
23 Rec. 137, at 203; Anderson Dep. at 94). This testimony does not establish that the
24 Sheriff’s Office had a policy of not tracking or counting citizen complaints.

25 The Court also looked at Exhibit 54, which contains excerpts of the
26 deposition of Sheriff Mace. This deposition includes much discussion of the
27 handling of citizen complaints, but it nowhere states that citizen complaints were
28 not properly investigated. (See Ct. Rec. 137, at 253-58; Mace Dep. at 35-44, 59-

1 admissible evidence that would support it.

2 Accordingly, taking Plaintiffs' version of the facts as true, there is
3 insufficient evidence of a policy or custom that amounts to deliberate indifference
4 of or a ratification of MacDonald's actions, nor is there sufficient evidence that
5 such a policy or custom was the driving force behind MacDonald's decision to
6 issue a citation to Mrs. Ciske. The Court therefore grants Klickitat County's
7 motion for summary judgment on this claim.

8 2. State Law Malicious Prosecution Claim

9 To succeed on a claim for malicious prosecution in Washington, a plaintiff
10 must allege and prove the following:

11 (1) that the prosecution claimed to have been malicious was instituted
12 or continued by the defendant; (2) that there was want of probable
13 cause for the institution or continuation of the prosecution; (3) that
14 the proceedings were instituted or continued through malice; (4) that
the proceedings terminated on the merits in favor of the plaintiff, or
were abandoned; and (5) that the plaintiff suffered injury or damage
as a result of the prosecution.

15 *Bender v. City of Seattle*, 99 Wn.2d 582, 593 (1983) (quoting *Gem Trading Co. v.*
16 *Cudahy Corp.*, 92 Wn.2d 956, 962-63 (1979)). Plaintiff bears the burden of
17 proving "malice" in a malicious prosecution case. *Id.* "Malice" has become a
18 term of art in malicious prosecution cases, and it may be established

19 by proving that the prosecution complained of was under taken from
20 improper or wrongful motives or in reckless disregard of the rights of
21 the plaintiff. Impropriety of motive may be established . . . by proof
22 that the defendant instituted the criminal proceedings against the
plaintiff (1) without believing him to be guilty, or (2) primarily
because of hostility or ill will towards him, or (3) for the purpose of
obtaining a private advantage as against him.

23 *Id.* at 594.

24 As discussed above, taking Plaintiffs' version of the facts as true, there exist
25 genuine issues of material fact which preclude judgment as a matter of law on
26 their State law malicious prosecution claim. The Court therefore denies
27

28 60, 64-69).

**ORDER DENYING IN PART, RESERVING IN PART MOTION TO
STRIKE *INTER ALIA* * 21**

1 Defendants' motions for summary judgment on this claim.

2 Accordingly, **IT IS HEREBY ORDERED**

3 1. The motions offered by and against Defendants House of Blues, Maryhill
4 Winery, and Maryhill Amphitheatre (Ct. Recs. 48, 84, 112, 144, 146, 165, 171, &
5 174) are **DENIED as moot**.

6 2. Defendant Klickitat County's Motion for Summary Judgment (Ct. Rec.
7 68) is **GRANTED in part, DENIED in part**. The Court grants summary
8 judgment and dismisses Plaintiffs' claims under § 1983, but denies summary
9 judgment on her State law malicious prosecution claim.

10 3. Defendant Klickitat County's Motion for Joinder in Defendant Ken
11 MacDonald's Motion to Strike (Ct. Rec. 161) is **GRANTED**.

12 4. Defendant Ken MacDonald's Motion for Summary Judgment (Ct. Rec.
13 74) is **GRANTED in part, DENIED in part**. The Court grants summary
14 judgment and dismisses Plaintiffs' Fourth Amendment claim under § 1983, but
15 denies Defendant's motion for summary judgment on Plaintiffs' Fourteenth
16 Amendment claim under § 1983 and on Plaintiffs' State law malicious prosecution
17 claim.

18 5. Defendant Ken MacDonald's Motion to Strike (Ct. Rec. 152) is
19 **GRANTED in part, DENIED in part, RESERVED in part**, as explained in the
20 above discussion.

21 6. Defendant Ken MacDonald's Motion to Expedite Regarding Motion to
22 Strike (Ct. Rec. 178), Motion to Expedite Regarding Overlength Brief (Ct. Rec.
23 180) and Motion for Leave to File Excess Pages (Ct. Rec. 182) are **GRANTED**.

24 ///

25 ///

26 ///

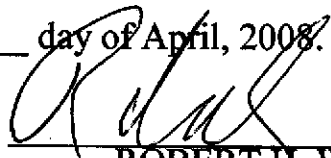
27 ///

28 ///

**ORDER DENYING IN PART, RESERVING IN PART MOTION TO
STRIKE *INTER ALIA* * 22**

1 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
2 enter this Order and to furnish copies to counsel.

3 **DATED** this ____ day of April, 2008.

4 
5 _____
6 **ROBERT H. WHALEY**
7 Chief United States District Judge

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
Q:\CIVIL\2006\Ciske v. House of Blues\SJ.ord.wpd